million we do not think that the learned Judge's award is wholly erroneous bearing in mind that the services rendered had almost reached the tendering stage. P32 which is being challenged was prepared by Udachin's own quantity surveyors and not by the architect as was the case in *Soon Nam Co. (ante).* The partial work performed by the architect such as detailed drawing plans were based on that estimate. We find no reason for Udachin to challenge the figures in P32. As such the learned Judge was right in adopting P32 and rejecting D45 as the basis for computing the remuneration of the architect. Having regard to all the circumstances, we are not prepared to conclude that the basis of computation of abandonment fee in the form of remuneration for partial services rendered was excessive or unfair. The award was a fair remuneration for the work done by the architect in this particular case. We find the award ought not be disturbed. The appeal is accordingly dismissed with costs.

Appeal dismissed.

Solicitors: *Cheang, Lee & Ong; Krishnan & Co.*

NON-METALLIC MINERAL PRODUCTS MANUFACTURING EMPLOYEES UNION v. MALAYA GLASS FACTORY BHD.

[F.C. (Wan Suleiman, Mohamed Azmi and Hashim Yeop A. Sani F.JJ.) October 19, 1983 & May 10, 1984]
[Johore Bahru – Federal Court Civil Appeal No. 172 of 1979]

Administrative Law – Application for order of certiorari to quash award of Industrial Court – Excess of jurisdiction – Part of award held to be ultra vires – Whether doctrine of severability can be applied – Check off – Shift allowance – Accident leave – Award made retrospective – Industrial Relations Act, 1967, ss. 7A, 13, 17(2), 30(7) & 32(8) – Employees Social Security Act, 1969, ss. 31 & 42.

In this case the Industrial Court had made an award in which it dealt with the proposals put forward by the parties to an industrial dispute. In its award the Industrial Court decided on 21 new articles which contained provisions disputed by one or other of the parties. The respondents referred to five articles in the award made by the Industrial Court saying that part of the award was *ultra vires* the Industrial Relations Act, 1967 and therefore the Industrial Court had acted without jurisdiction. The High Court quashed the award of the Industrial Court. The appellants appealed.

Held: three of the five disputed items were within jurisdiction and only the awards relating to check off and accident leave were made without jurisdiction. The severance of the two articles would not make what remained of the award unworkable and therefore in this case only the award in respect of the two articles should be quashed.

Cases referred to:

(1) *South East Asia Fire Bricks Sdn. Bhd.* v. *Non-Metallic Mineral Products Manufacturing Employees Union & Ors.* [1980] 2 M.L.J. 165, 166.
(2) *Dr. A. Dutt* v. *Assunta Hospital* [1981] 1 M.L.J. 304, 314.
(3) *Queen* v. *Portus & Anor.* (1972) 127 C.L.R. 353.
(4) *Bowman* v. *State and Stace Services Commission* [1972] N.Z.L.R. 78.
(5) *Regina* v. *Arundel Justices, Exparte Jackson* [1959] 2 W.L.R. 798.
(6) *Ratnam* v. *Cumarasamy & Anor.* [1965] 1 M.L.J. 228.

FEDERAL COURT.

K.P. Gangadharan for the appellant.
R.R. Chelliah (T.M. Varughese with him) for the respondents.

Cur. Adv. Vult

Wan Suleiman F.J. (delivering the Judgment of the Court): The respondent company applied for an order of certiorari to quash the award of the Industrial Court handed down on June 30, 1978 whereby the latter fixed and determined the wages, terms and conditions of employment for all the workers in the employment of the company.

The Company and the Union had entered into a Collective Agreement which was taken cognizance of by the Industrial Court. The agreement was for a period of three years beginning on March 1, 1974 and expiring on February 28, 1977.

When the Collective Agreement expired, negotiations were commenced for the purpose of making a new collective agreement. When their efforts to conclude this new agreement failed the Union resorted to industrial action on October 8, 1977. The Minister of Labour and Manpower then referred the dispute to the Industrial Court under section 26(2) of the Industrial Relations Act, 1967 on October 14, 1977. The Industrial Court handed down its award dated June 30,

1978, which was however effective from May 14, 1977.

The Industrial Court considered the case in full and in its award dealt with every article in the proposals and the collective agreement. It adopted 14 of the articles which had been agreed upon by both parties. It decided on 21 new articles which contain provisions disputed by either one or the other party. It left out 2 of the 37 articles without making any award to await the decision of the High Court.

The respondents referred to five articles in the award made by the Industrial Court saying that that part of the award is *ultra vires* the Industrial Relations Act, 1967, and alleged that it had therefore acted without or in excess of jurisdiction.

The decision was made on August 12, 1978 and therefore it is common ground that we are concerned only with the state of the law prior to the amendment to the Industrial Relations Act, 1967 of May 30, 1980. For ease of reference, section 32(3)(a) (which was deleted by Act A484, Section 25 w.e.f. 30/5/80) reads:–

"Subject to this Act, an award of the Court shall be final and conclusive, and no award shall be challenged, appealed against, reviewed, quashed or called in question in any court."

Encik Gangadharan for the appellant concedes that because of the Privy Council decision in *South East Asia Fire Bricks Sdn. Bhd.* v. *Non-Metallic Mineral Products Manufacturing Employees Union & Ors.*[1] – see also *Dr. A Dutt* v. *Assunta Hospital*[2] – for certiorari to apply there must be no jurisdiction or excess of jurisdiction on the part of the tribunal concerned.

It is also common ground that only 5 items or articles in the collective agreement before the Industrial Court are in dispute. Fourteen other items are not in dispute, and Encik Gangadharan, for appellant says that even if there had been excess or lack of jurisdiction as regards the five, the learned Judge should not have quashed the whole award. We shall in due course consider the doctrine of severability.

The first is Article 6 – "Check-off". The appellants thereby sought to get the respondents to deduct union subscriptions from union members who have authorised the company (respondents) to do so. Encik Gangadharan says that this is a continuation of what was already in practice under the previous agreement and therefore cannot be in excess of jurisdiction.

On behalf of respondents it was argued that this item is not a trade dispute as defined in S.2 i.e. it is not connected with the employment or non-employment or the terms of employment or the conditions of work. It is not a condition of service. The previous collective agreement, continued Encik Chelliah, was a separate matter so that the Court acted in excess of jurisdiction.

He cited *The Queen* v. *Portus & Anor.*[3] as authority for the proposition that consensual practice of employees and employers cannot expand the jurisdiction of the tribunal. We are inclined to agree with him, and would hold that the Tribunal was, on this matter, acting outside its jurisdiction.

We shall next consider Article 7 of the collective agreement. Both parties had agreed to similar proposals submitted by both sides to the effect that when vacancies occur in higher grades, the Company should give preference to promote serving employees. The respondent Company however had subsequent misgivings, and in the Court below, submitted that the inclusion of such a provision in the collective agreement is contrary to section 13(3) of the Industrial Relations Act, 1967, which is set out below:

"Section 13(3) – Notwithstanding subsection (1), no trade union of workmen may include in its proposals for a collective agreement a proposal in relation to any of the following matters, that is to say –

(a) the promotion by an employer of any workman from a lower grade or category to a higher grade or category;"

Appellant says that the prohibition is on the trade union, and not on the employer. A glance at the words of section 13(3)(a) will show that the appellant is correct.

Encik Gangadharan says that this is one instance where the right to certiorari may be lost by acquiescence or implied waiver, referring us to a passage at page 423 of 3rd Edition of *de Smith.*

We think that quite apart from the fact of acquiescence or implied waiver of jurisdiction on the respondent's part, it is the undeniable fact that the Company had itself included such a provision in its own proposal, something which section 13(3)

(a) does not forbid. The question of lack of jurisdiction therefore does not arise here.

The next ground deals with Article 25, shift allowance. In the Court below, and indeed before us, the stand taken by the Company was that this was overtime payment which could at times be at a lower rate than that provided for in the Employment Act, 1955.

Before us Encik Chelliah points out that the respondent's complaint is confined to the $2 for "every hour of overtime" which this Article sought to obtain. This he says is contrary to section 60 A(3) of the Employment Act which entitles the worker to not less than one and a half times his hourly rate.

The Article is set out in full hereunder:

"Article 25 – Shift Allowance (as awarded)

Employees engaged in shift work shall be paid a shift allowance as follows:

(i) 1st shift (7 a.m. – 3 p.m.) – Nil
(ii) 2nd shift (3 p.m. – 11 p.m.) – 60 cents
(iii) 3rd shift (11 p.m. – 7 a.m.) – 1.20

The 2nd and 3rd shift workers are eligible to $2.00 for every hour overtime.

*The above changes are found to be sufficient compensation for late hours of work."

On behalf of the appellant we were referred to the award on overtime – Article 9 at pages 137/138 of the record, which it was submitted accorded with the provisions of the Employment Act. Hence the complaint is that the learned judge had failed to make a distinction between shift allowance and overtime. The words "eligible to $2.00 for every hour overtime" refers to a special rate of shift allowance to 2nd and 3rd shift workers who do work in excess of the normal shift hours, and this would be *in addition to* whatever overtime payments such workers are eligible to receive. Being therefore terms more favourable to the employee than those provided for in the Act, section 7A make them valid.

We agree with him that the Industrial Court was here well within its jurisdiction.

Article 15 deals with accident leave. The learned trial judge held that this was contrary to the provisions of section 31 of the Employees' Social Security Act, 1969 which states *inter alia* that an insured person or his dependants shall not be entitled to receive or recover from the employer damages under any law for the time being in force. The mischief created by Article 15 of the award, he added would open the door to litigation against the employer, thus creating a new liability which section 31 seeks to exclude. Before us, Encik Chelliah adds yet another objection. Section 42 of the same Act debars any person entitled to receive benefits under the Act from receiving any similar benefit from the provisions of any other written law. Article 15 would be in the latter category.

We are of the view that the combined effect of both these sections effectively debars appellant from making arrangements for additional benefits outside the Act.

The last ground concerns Article 35, wherein the Court made the award retrospectively from May 15, 1977. The learned Judge took the view that in the previous agreement the parties had provided that until a new agreement is executed the terms of the previous one would remain in force. It had no power to vary the terms of the old agreement, which is the effect of such retrospective order.

Encik Gangadharan however counters with section 30(7) of the Industrial Relations Act, which prior to the 1980 amendment reads:–

"Section 30(7) – An award may specify the period during which it shall continue in force, and may be retrospective to such date as is specified in the award:

Provided that the retrospective date of the award may not, except in the case of a decision of the Court under section 33 or an order of the Court under section 56(2)(c) or a decision of the Court on a reference to it under section 20(3), be earlier than six months from the date on which the dispute was referred to the Court."

The previous agreement was for the period March 1, 1974 to February 28, 1977. Section 17(2) of the Act, he adds, also empowers the Court to make such retrospective Order. We are satisfied that he is correct.

Jurisdiction to adjudicate on fourteen of the provisions of the Collective Agreement is conceded. We have held that three out of the five disputed ones are within jurisdiction. Encik Gangadharan says that the doctrine of severability may be invoked. That this Court can sever the good

from the bad there is no doubt – (see pages 105/106 of the same edition of *de Smith* earlier mentioned). This principle was for instance applied in *Bowman* v. *State and Stace Services Commission*[4] and *Regina* v. *Arundel Justices Ex parte Jackson*[5].

For the respondent Encik Chelliah argues that submissions had been made before the learned judge on the exercise of his discretion whether to sever or not, and he had chosen not to. Our attention was drawn to *Ratnam* v. *Cumarasamy & Anor*[6] where their Lordships of the Privy Council said that it would not interfere with the discretion exercised by a lower court unless it is clearly satisfied that the discretion had been exercised on a wrong principle and should have been exercised in a contrary way or that there had been a miscarriage of justice.

After careful consideration we are satisfied that this is an instance where we can properly interfere with the exercise of that discretion. The severance of the two articles – Article 6 – "Check off" and Article 15 – Accident leave" do not in our considered view, make what remains of the Collective Agreement unworkable.

We would therefore allow the appeal to the extent that the order of the High Court quashing the whole award of the Industrial Court handed down on June 30, 1978 be set aside, and instead, severing good from bad, we order that only the award in respect of Articles 6 and 15 be squashed.

Order accordingly.

Solicitors: *John R. Gurusamy & Gangadharan; Sethu, Ghazali & Gomez.*

SI RUSA BEACH RESORT SDN. BHD. v. ASIA PACIFIC HOTELS MANAGEMENT PTE. LTD.

[F.C. (Abdul Hamid C.J. (Malaya), Mohamed Azmi & Syed Agil Barakbah F.JJ.) April 18 & May 16, 1984] [Kuala Lumpur – Federal Court Civil Appeal No. 76 of 1984]

Contract – Management Services Agreement – Breach – Application for injunction and temporary injunction – Contract for personnel service – Adequacy of damages – Whether there were serious questions to be tried – – Balance of convenience – Specific Relief Act, 1950, ss. 20 & 54(b).

In this case the appellant company entered into an agreement with the respondent company, under which the running of the hotel would fall on the respondent company. There were disputes between the parties and the respondent company made an application for an interim injunction to restrain the appellant company, its servants or agents from interfering in the running of the hotel. The application for an interim injunction was granted and a subsequent application by the appellant to set aside the interim injunction was dismissed. The learned trial judge held that there were serious questions that arose to be tried. He also held that the balance of convenience was in favour of the respondents, based upon a consideration of the loss to be sustained by the respondents in the event of the interim injunction being withdrawn. The appellants appealed.

Held: the learned trial judge was correct in holding that there were serious questions to be tried in this case but he failed to consider that at all material times the appellant was in possession and control of the hotel. If the *status quo* is to be maintained the only order that could be properly made is to allow the appellant to continue to run the hotel until the action is finally litigated and a decision made thereon.

Cases referred to:

(1) *Lumley* v. *Wagner* (1852) 1 De G.M. & G. 604; 42 E.R. 687

(2) *Hounslow London Borough Council* v. *Twickenham Garden Developments Ltd.* [1971] 1 Ch. D. 232.

(3) *Foster & Dicksee* v. *Hastings Corporation* (1903) 87 L.T. 736; 19 T.L.R. 204

(4) *Venthanayagam* v. *Karuppiah & Ors.* [1968] 1 M.L.J. 283.

(5) *American Cyanamid Co.* v. *Ethicon Ltd.* [1975] 1 All E.R. 504, 510.

FEDERAL COURT.

R.R. Chelliah (P. Vijendran with him) for the appellant.

C. Abraham (P. Abraham with him) for the respondent.

Cur. Adv. Vult.

Abdul Hamid C.J. (Malaya) delivering the Judgment of the Court): This is an appeal against the order of Peh Swee Chin, J., dismissing the appellant's application to set aside an interim injunction granted to the respondent.

The facts are not in dispute. They are set out in the grounds of judgment of the learned Judge. Suffice if we advert to those facts we consider necessary for the determination of this appeal.

The appellant company Si Rusa Beach Resort Sdn. Bhd. is a wholly owned subsidiary of Si